



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 22, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-24

Ms. C. April Boling, CPA
Treasurer, Republican Party of San Diego County
7185 Navajo Road, Suite P
San Diego, CA 92119

Dear Ms. Boling:

We are responding to your advisory opinion request on behalf of the Republican Party of San Diego County (the "Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the activities of the Committee's Voter Registration Coordinator (the "Employee") and Executive Director.

Because the Commission concludes that more than 25 percent of the Employee's activities recruiting, training, and supervising contractors hired by the Committee during the applicable Federal election activity ("FEA") time periods are Type I FEA (voter registration activity) under the Act and Commission regulations, the Employee must be paid exclusively from the Committee's Federal account within those periods. The Commission was unable to reach a response by the required four affirmative votes on the question of whether the Executive Director's supervision of the Employee constitutes voter registration activity.

Background

The facts presented in this advisory opinion are based on your letter received on September 15, 2010.

The Committee is a local committee of the Republican Party. The Committee hired the Employee in May 2010. The Employee's sole function is to recruit, train, and supervise contractors hired by the Committee exclusively to perform voter registration activities. The Employee spends 100 percent of her time engaged in this activity.

The Employee spends approximately 20 percent of her time on each of the following four categories of activities, for a total of 80 percent of her time:

(1) Recruitment, (2) Orientations, (3) Contractor management, and (4) Validation of completed registrations.

- Recruitment – includes posting positions on job boards, meeting with clubs to encourage members to participate in the electoral process by registering voters, interviewing potential contractors, and scheduling orientations for contractors.
- Orientations – includes both one-on-one and group meetings with potential contractors to communicate the Committee's voter registration program's requirements relating to the contractors' responsibilities, protocol, and payment structure. This category also includes training contractors on voter eligibility requirements, legal rights to solicit, and table set-up instructions.
- Contractor management – includes providing additional training upon request, responding to requests from business owners for verification of contractor status and program details, and completing vendor applications on request.
- Validation of completed registrations – includes scheduling the turning in of voter registration cards, reviewing the voter registration cards for missing information or errors made by the voters, photocopying voter registration cards, calling newly registered voters to welcome them to the Republican Party, reviewing and verifying information on voter registration cards, reporting any suspicious information revealed on such review to the Registrar of Voters, and personally submitting the voter registration cards to the Registrar of Voters.

The remaining 20 percent of the Employee's activity is divided between three additional categories of work. These categories and the percentage of time spent on them are as follows: (1) Material preparation – 10 percent, (2) Events – five percent, and (3) Calculation of contractor payments – five percent.

- Material preparation – includes designing and preparing signs and other voter registration materials for the contractors.
- Events – includes researching potential events at which voter registration may take place and alerting contractors to them, as well as determining the number of contractors to attend such events. It also includes setting up and tearing down voter registration booths, but it does not include the Employee's actual registration of any voters, herself.
- Calculation of contractor payments – includes all activities related to calculating the payments to be received from the California Republican Party, and the payments to be distributed to each contractor depending on the number of voter registrations in targeted State Assembly and State Senate districts.

The Committee anticipates that it will also employ a Voter Registration Coordinator with these duties in future election cycles.

The Committee is currently reporting the activities of the Employee during the applicable FEA time periods as FEA to the Commission. If the Employee's activities are not FEA, however, the Committee would like to amend its reports and to transfer the appropriate amount of non-Federal funds¹ to cover the non-Federal share of those costs.

Questions Presented

(1) Are the Employee's activities voter registration activity and therefore FEA during the 120 days prior to an election?²

(2) If the answer to Question 1 is "yes," do the activities of the Executive Director in supervising the Employee also constitute voter registration activity?

(3) If the answer to Question 1 is "no," may the Committee amend its reports previously filed with the Commission characterizing the Employee's activities as FEA, and transfer the appropriate amount of non-Federal funds to cover the non-Federal share of the cost for these activities?

(4) Will the answer to Question 1 differ under the new FEA regulations that are scheduled to take effect on December 1, 2010?

Legal Analysis and Conclusions

(1) Are the Employee's activities voter registration activity and therefore FEA during the 120 days prior to an election?

Because more than 25 percent of the Employee's activities are voter registration activity and therefore constitute Type I FEA within California's FEA voter registration periods for 2010, the Employee must be paid exclusively from the Committee's Federal account within those periods.

The Bipartisan Campaign Reform Act of 2002³ ("BCRA") amended the Act, in pertinent part, by introducing and defining a new term – FEA – and by requiring State,

¹ Non-Federal funds are funds that do not comply with the amount limitations and source prohibitions of the Act. 11 CFR 300.2(k).

² Voter registration activity is FEA "during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election." 2 U.S.C. 431(20)(A)(i). For California for 2010, these periods are February 8 through June 8 and July 5 through November 2. See "Federal Election Activity Dates for 2010," Federal Election Commission, at http://www.fec.gov/pages/bcra/rulemakings/charts_fea_dates_2010.shtml. The Committee has not asked, and the Commission does not address in this advisory opinion, whether any of the Employee's activities constitute FEA outside of the 120-day voter registration activity FEA time periods.

district, and local party committees to pay for FEA with either Federal funds or a combination of Federal and Levin funds.⁴ 2 U.S.C. 441i(b). The Act's definition of FEA includes voter registration activity during the period beginning 120 days before the date of a regularly scheduled Federal election, and ending on the date of the election. 2 U.S.C. 431(20)(a)(i) (also known as Type I FEA). Commission regulations define voter registration activity as "contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote." 11 CFR 100.24(a)(2).⁵ It includes, but is not limited to, "printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms." *Id.*

The Committee states that the Employee spends 20 percent of her time validating complete registrations, which includes assisting individuals in registering to vote by reviewing their voter registration cards for missing information or errors, and taking the voter registration cards and turning them in to the Registrar of Voters. The Employee spends an additional 10 to 15 percent of her time preparing materials for use in registering voters, such as signage, in-field voter registration materials, and setting up and tearing down voter registration booths. These activities fall within the definition of voter registration activity. *See* 11 CFR 100.24(a)(2) (defining voter registration activity to include "printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms").

Regardless of whether any of the Employee's additional activities fall within the definition of voter registration activity, the Commission's regulations require State and local party committees to use a Federal account to pay for salaries, wages, and fringe benefits of any employees who spend more than 25 percent of their compensated time in a given month on FEA. *See* 11 CFR 106.7(d)(1)(ii) and 300.33(d)(2). Accordingly, because the Employee spends at least 30 to 35 percent of her time on Type I FEA within California's FEA voter registration periods, she must be paid exclusively from the Committee's Federal account within those periods.

³ Pub. L. No. 107-155, 116 Stat. 81 (2002).

⁴ "Federal funds" are funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act. 11 CFR 300.2(g). "Levin funds" are funds raised by State, district, and local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. 11 CFR 300.2(i).

⁵ In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), the United States Court of Appeals for the District of Columbia Circuit upheld the district court's decision and held that the Commission's regulatory definition of, *inter alia*, voter registration was overly permissive and thus contrary to the statute. The circuit court remanded the regulation to the Commission, which promulgated revised regulations on September 10, 2010, as discussed more fully below in Question 4. Since the revised regulations do not take effect until December 1, 2010, the Commission analyzes Questions 1 through 3 under the old regulations, which remain in effect until December 1, 2010.

(2) If the answer to Question 1 is “yes,” do the activities of the Executive Director in supervising the Employee also constitute voter registration activity?

The Commission could not reach a response by the required four affirmative votes with respect to this question.

(3) If the answer to Question 1 is “no,” may the Committee amend its reports previously filed with the Commission describing the Employee’s work as FEA, and transfer the appropriate amount of non-Federal funds to cover the non-Federal share of the cost for these services?

This question is moot, because the answer to Question 1 is “yes.”

(4) Will the answer to Question 1 differ under the new FEA regulations that are scheduled to take effect on December 1, 2010?

No, the answer to Question 1 will not differ under the new FEA regulations that take effect on December 1, 2010.

In September 2010, the Commission adopted new definitions of GOTV activity and voter registration activity in response to the decision by the United States Court of Appeals for the District of Columbia Circuit in *Shays III*.⁶ See Explanation and Justification for Final Rules on the Definition of Federal Election Activity, 75 FR 55257 (Sept. 10, 2010) (“2010 E&J”).

As revised, the definition of voter registration activity has been expanded to include activities that encourage or urge people to register to vote, as well as those that assist them in registering to vote. 2010 E&J at 55260, 55267. In addition, the current regulatory language about contacting potential voters by “individualized means” has been eliminated. Accordingly, the Employee’s activities also constitute voter registration activity under the revised definition.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on

⁶ The Court of Appeals for the D.C. Circuit in *Shays III* found two flaws in the definitions. First, by requiring efforts to “assist” people to vote or to register to vote, the definitions improperly excluded efforts that “actively encourage people to vote or to register to vote.” *Id.* Second, by limiting the scope of the definitions to contacting voters by “individualized means,” the definitions improperly excluded “mass communications targeted to many people,” and otherwise had the effect of narrowing the activities covered by the rules. *Shays III*, 528 F.3d 914.

this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law.

On behalf of the Commission,

(signed)
Matthew S. Petersen
Chairman